No. 14-20594

In the United States Court of Appeals for the Fifth Circuit

LILA MCWHIRTER, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF EUGENE MCWHIRTER,

PLAINTIFF – APPELLANT

V.

AAA LIFE INSURANCE COMPANY,

DEFENDANT – APPELLEE

On Appeal from the United States District Court
Southern District of Texas, Houston Division
No. 4:14-cv-317

BRIEF OF APPELLANT LILA MCWHIRTER, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF EUGENE MCWHIRTER

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Lila McWhirter (Plaintiff–Appellant)
2. The Estate of Eugene McWhirter (Plaintiff–Appellant)
3. AAA Life Insurance Company (Defendant–Appellee)
4. Jack E. McGehee, McGehee ✯ Chang, Barnes, Landgraf, counsel for Appellant
5. H.C. Chang, McGehee ✯ Chang, Barnes, Landgraf, counsel for Appellant

6. Stephen A. Barnes, McGehee ✯ Chang, Barnes, Landgraf, counsel for Appellant

7. Benjamin T. Landgraf, McGehee ✯ Chang, Barnes, Landgraf, counsel for Appellant

8. James P. McInerny, Hartline Dacus Barger Dreyer, LLP, counsel for Appellee

9. Hon. Lynn Hughes, United States District Judge, Southern District of Texas

/s/ Benjamin T. Landgraf
Attorney for Appellant

STATEMENT REGARDING ORAL ARGUMENT

Mrs. McWhirter is confident the straightforward issue presented in this appeal is adequately briefed, and oral argument would not materially aid in the decisional process. However, should the Court believe oral argument is beneficial, Mrs. McWhirter stands ready to provide oral argument at the Court's request.

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STATEMENT OF JURISDICTION

Plaintiff-Appellant Lila McWhirter ("Mrs. McWhirter") originally filed this action in the State District Court of Harris County, Texas under cause number 2014-01182. (ROA.11). Shortly thereafter, Defendant-Appellee AAA filed a timely Notice of Removal of the action to the United States District Court for the Southern District of Texas, Houston Division, based on diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). (ROA.5). Mrs. McWhirter and her late husband's estate are residents of Texas, and AAA is a resident of Michigan. (ROA.11).

On March 24, 2014, Mrs. McWhirter filed a Notice of Intent to Dismiss Non-Contractual Claims. (ROA.171). On March 27, 2014, the district court signed a Partial Dismissal, leaving only the breach of contract claim to be adjudicated. (ROA.173). Pursuant to a request for summary judgment filed by AAA, the district court entered a final judgment that disposed of all parties' claims on August 15, 2014. (ROA.180).

Mrs. McWhirter timely filed a Notice of Appeal on September 11, 2014. (ROA.181). This Court has jurisdiction over the final decision of the district court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court erred in granting summary judgment in favor of AAA, when Mrs. McWhirter presented competent evidence which supported her contention that Eugene McWhirter's accident occurred while he was exiting his daughter's vehicle.

STATEMENT OF THE CASE

Statement of Facts

In 2011, AAA began mailing "Member Loyalty Travel Accident Insurance" advertisements to 85-year-old Eugene McWhirter ("Mr. McWhirter" at his home in Houston. (ROA.13). Mr. McWhirter had been a member of AAA's family of companies since 2006. *Id.* Mr. McWhirter and his wife reviewed the language in the mailers. They took note of the fact that the insurance would cover them for accidents that occur "around your home" and even "when you're out walking." *Id.*

In 2012, the McWhirters purchased AAA's Member Loyalty Travel Accident Insurance under policy number 4020583276. *Id.* The policy became effective on August 29, 2012, and provided, among other things, loss of life benefits in an amount of $150,000 for an insured who passed

away as a result of an accident involving a common carrier or automobile, or as a pedestrian. (ROA.77); (ROA.84).

With respect to automobile coverage, the policy covered the following:

> [A]ccidental bodily injuries received while the Insured is covered under the Policy which result in a covered loss, independent of sickness and all other causes, as follows: . . . . **While**[] driving, riding in, boarding or **exiting from any private passenger automobile** or [] by being struck while a pedestrian, by any motor vehicle ordinarily operated on the public streets and highways.

(ROA.84) (emphasis added). The policy also contained an Exceptions and Limitations provision which excluded coverage for a host of scenarios not applicable in the instant action. *See* (ROA.86).

On December 20, 2012, the McWhirters returned home with their daughter from a Christmas party. (ROA.13). They were riding in their daughter's 2005 Mercury Mountaineer sport-utility-vehicle. (ROA.153). Mr. McWhirter was the only passenger in the backseat. His wife was in the front passenger seat. (ROA.142). The daughter backed her SUV into the McWhirters' carport. *Id.* While attempting to exit the vehicle from the backseat, Mr. McWhirter fell and hit his head on the ground. The car door remained open after his fall. (ROA.149).

As a direct result of the fall, Mr. McWhirter suffered a bleed in his brain. (ROA.159). He spent forty-two days in the hospital, and an additional fourteen days at home while being cared for by home-health nurses and physical therapists. Tragically, on February 21, 2013, he passed away as a result of the head injury sustained in the fall. (ROA.158).

Mrs. McWhirter, the beneficiary of her husband's policy, timely filed a claim with AAA, provided all documentation as requested, and otherwise fully cooperated. (ROA.14). However, AAA denied the claim. In its denial letter, AAA recognized that the accident policy covers injuries sustained "while . . . exiting from any passenger automobile," but contended that the "injuries were received as a result of a fall from stairs," and therefore "the injuries were not received in a covered accident." (ROA.97).

Because her home had no stairs, and she never represented the existence of stairs to AAA, Mrs. McWhirter, with the assistance of her daughter, requested re-evaluation of the denial. AAA affirmed its denial. (ROA.101). In doing so, however, it abandoned the "fall from

stairs" basis for denial, and instead concluded that there was no coverage because "Eugene had fully exited the vehicle when he fell." *Id.*

Course of Proceedings and Disposition Below

Mrs. McWhirter, individually and as representative of the estate of her late husband, filed the instant action against AAA in the State District Court of Harris County, Texas under cause number 2014-01182. (ROA.11). She asserted state-law claims of breach of contract, deceptive insurance practices, deceptive trade practices, fraud, fraudulent inducement, and negligence per se. (ROA.15–18).

The breach of contract action was based on AAA's denial of the claim despite the policy being in force at the time of the accident and despite the accident being covered pursuant to the express language of the policy. (ROA.15). The remaining causes of action were predicated on the misrepresentations contained in AAA's advertisements regarding the scope, nature, and extent of coverage actually provided in the insurance policy. (ROA.16–18). AAA filed an answer generally denying Mrs. McWhirter's claims. (ROA.4).

On February 10, 2014, AAA filed a Notice of Removal of the action to the United States District Court for the Southern District of Texas,

Houston Division, based on diversity jurisdiction. (ROA.4). The case was assigned to the Honorable Lynn N. Hughes, United States District Judge, under cause number 4:14-cv-00317. (ROA.1). Counsel for the parties held a status conference with the district court in its chambers on March 11, 2014. (ROA.204–24).

On March 18, 2014, AAA moved for partial summary judgment on Mrs. McWhirter's breach of contract claim. (ROA.66). In its motion, AAA contended that coverage was lacking "as a matter of law" because Mr. McWhirter did not sustain his injuries while exiting a vehicle, and his death did not occur independent of sickness and other causes. (ROA.66–69). Mrs. McWhirter timely filed a Response to AAA's motion. (ROA.124). In support of her contention that her husband fell while exiting the vehicle, Mrs. McWhirter attached to her Response an affidavit from herself and her daughter (both present when the accident occurred), the Claimant Statement, and the Accident/Injury Claim form. (ROA.128–30). And in support of her contention that no extrinsic sickness or other cause was a factor in her husband's death, Mrs. McWhirter attached to her Response an affidavit from her husband's primary care physician, AAA's Attending Physician's Reports filled out

by the physicians, and various portions of the post-fall medical record. (ROA.133–38). Contemporaneous with filing her Response, Mrs. McWhirter filed a Notice of Intent to Dismiss Non-Contractual Claims. (ROA.171). The district court signed a Partial Dismissal of Mrs. McWhirter's non-contractual claims on March 27, 2014 with prejudice. (ROA.173).

On August 15, 2014, the district court granted AAA's partial motion for summary judgment on the basis that there was no coverage because Mr. McWhirter fell after "having fully left his car." (ROA.177). The court declined to address whether the fall was independent of sickness or infirmity, but opined that had it decided the issue, it would have denied summary judgment on that basis. (ROA.178). The district court signed a Final Judgment the same day. (ROA.180). Mrs. McWhirter timely filed a Notice of Appeal on September 11, 2014. (ROA.181).

SUMMARY OF THE ARGUMENT

This appeal presents a discrete, simple question. Is there a genuine issue of material fact regarding whether Mr. McWhirter was still exiting his daughter's SUV when he fell on the night of December

20, 2012? Said differently, is it *so clear* that he was no longer exiting the vehicle when he fell, that the district court was correct in granting AAA judgment as a matter of law on that issue? Mrs. McWhirter contends that the district court's ruling was in error.

The evidence shows that Mr. McWhirter was still exiting the vehicle when he fell. Mrs. McWhirter—the only person outside with her husband at the time of the accident—swore via affidavit that when she came around the car, she found Mr. McWhirter lying in the grass "right next to the car."

The McWhirters' daughter had just gone inside the house when she heard a noise outside. She stated that when she came back outside seconds after the fall, she found her father lying next to the car, in the grass, with his car door "open above him."

Texas cases shed little light on the specific factual scenario presented in this appeal. However, the Texas Supreme Court has recognized that insurance terms encompass a myriad of potential auto-related occurrences. For example, the court has held a "motor vehicle accident" to include the entangling of one's foot in the bottom of a door when attempting to exit a parked pickup truck. *See Texas Farm Bureau*

Mut. Ins. Co. v. Sturrock, 146 S.W.3d 123, 125 (Tex. 2004). Texas courts have also exercised care to stay within the bounds of reason. The Houston court of appeals has declined to extend the term "occupying" a vehicle to include walking for over five minutes away from the truck. *McDonald v. Southern Cnty. Mut. Ins. Co.*, 176 S.W.3d 464, 467 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

The facts of this appeal fit squarely within this paradigm. Mr. McWhirter was insured for accidents that occurred while exiting a private vehicle. While exiting his daughter's SUV, he accidentally fell. He was found right next to the car with the car door open above him. This factual scenario resides well within the parameters of coverage, and does not present a limits-of-reason situation such that the Court must grapple with whether Mrs. McWhirter could reasonably prevail in front of a jury. Consequently, Mrs. McWhirter respectfully urges the Court to reverse the district court's summary judgment ruling.

ARGUMENT

I. Standard of Review

The appellate court reviews de novo a grant of summary judgment, and applies the same standard as the trial court. *Johnston &*

Johnston v. Conseco Life Ins. Co., 732 F.3d 555, 561 (5th Cir. 2013). A summary judgment movant bears an "exacting" burden. *See Impossible Elec. Techniques, Inc. v. Wackenhut Prot. Sys., Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). In order to prevail, a party seeking summary judgment must demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

To avoid summary judgment, the nonmovant need only present evidence sufficient to show that "'reasonable and fair-minded men . . . might reach different conclusions.'" *Swanson v. General Svcs. Admin.*, 110 F.3d 1180, 1191 (5th Cir. 1997) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374–75 (5th Cir. 1969) (en banc)); *see also McBeth v. Carpenter*, 565 F.3d 171, 176 (5th Cir. 2009). If the evidence "presents a sufficient disagreement" over a factual issue, summary judgment must be denied. *See Chiari v. City of League City*, 920 F.2d 311, 314–15 (5th Cir. 1991) (quotation omitted).

The appellate Court must "view the facts and the inferences to be drawn from them in the light most favorable to the nonmoving party."

Wyatt v. Hunt Plywood Co., Inc., 297 F.3d 405, 409 (5th Cir. 2002). Resolution of factual issues, weighing the evidence, or assessment of the credibility of witnesses should not be undertaken at the summary judgment stage; the focus is on identifying whether a factual dispute exists. *See Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir. 2005) (quotation omitted).

II. Application of Texas Substantive Law to the Dispute

"A federal court sitting in diversity applies the substantive law of the forum state." *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 258 (5th Cir. 2013) (internal citation omitted). Under Texas law, insurance policies are generally controlled "by the rules of construction and interpretation applicable to contracts." *Lincoln Gen. Ins. v. Aisha's Learning Ctr.*, 468 F.3d 857, 858 (5th Cir. 2006) (citing *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)).

Mrs. McWhirter recognizes that the dispute always has been whether the scope of the phrase "while exiting from any private passenger automobile" encompasses the factual scenario present in the instant case. She contends that, without question, her husband's fall occurred while exiting the vehicle. But she acknowledges that at a

minimum, a sufficient dispute exists over whether he was still exiting the car at the time of the fall.

Therefore, summary judgment was improper. *See, e.g.*, *Food Source, Inc. v. Zurich Ins. Co.*, 751 S.W.2d 596, 598 (Tex. App.—Dallas 1988, writ denied) (holding that it is proper for a jury to decide whether insurance coverage exists when conflicting evidence is presented regarding the application of a policy term to a given factual scenario); *see also Emmert v. Progressive Cnty. Mut. Ins. Co.*, 882 S.W.2d 32, 34–35 (Tex. App.—Tyler 1994, writ denied) (holding that summary judgment is inappropriate when a material fact issue exists as to the scope of insurance language applied to specific facts).

III. The District Court Erred By Determining that No Genuine Dispute Exists Regarding Whether Mr. McWhirter was Exiting the Vehicle When He Fell

A curious series of findings occurred at the district court level.[1] These findings were announced as the support for the trial court's conclusion that Mr. McWhirter had fully exited the vehicle when he fell,

[1] The purpose of this refutation of the district court's findings is not to disrespect the court. Rather, it is to show that summary judgment should not have been granted due to the existence of genuine issues of material fact. Mrs. McWhirter uses the district court's findings simply as a template within which she can frame her evidence illustrating a genuine dispute.

and therefore, no coverage existed for the accident. *See generally* (ROA.177–79) (district court's opinion).

The problem these findings present, however, is that they are directly contrary to the competent evidence indicating that Mr. McWhirter fell *while* exiting the vehicle. The district court's adoption of essentially all evidence contrary to that provided by Mrs. McWhirter violated the instruction to construe the evidence in a light most favorable to the nonmovant as well as the prohibition on assessing the credibility of witnesses or weighing the evidence at the summary judgment level. *See Boudreaux*, 402 F.3d at 540.

A. The District Court's Findings

First, the district court announced that after the fall, Mr. McWhirter was discovered "a few feet away from [the vehicle] on a sidewalk." (ROA.177). This finding, if undisputed, supports the district court's ultimate conclusion because the sidewalk is near the door of the home, several feet away from the subject vehicle.

However, Mrs. McWhirter affirmed that she found her husband "on the ground *right next to the car*. He was lying on his back *in the grass*." (ROA.142) (emphasis added). She went on to state that her

husband "was lying in the yard next to the car." (ROA.144). Similarly, Mrs. McWhirter's daughter stated that she saw her father "lying on his back in the yard next to the car. His car door was open *above him*." (ROA.149) (emphasis added).

Second, the district court quoted Mrs. McWhirter as saying "that it appeared 'as though he had not yet made it that far when he fell,'" for the proposition that even Mrs. McWhirter recognized her husband was walking when the accident occurred. *See* (ROA.178). However, Mrs. McWhirter made that statement while refuting AAA's erroneous assertion that Mr. McWhirter fell from stairs. She was noting that the only elevated step is a very small one (3 to 4 inches high) onto the front porch, but because Mr. McWhirter "*was lying in the yard next to the car*, it appears as though he had not yet made it that far when he fell." (ROA.144) (emphasis added).

Third, the district court cited Mr. McWhirter's death certificate, where it claimed he died as a result of a "fall from stairs." (ROA.178). The court cited the certificate notwithstanding the fact the Mrs.

McWhirter and her daughter—both long-time residents[2] of the house where the accident occurred—vehemently denied the existence of any stairs at their home. (ROA.150); (ROA.144).

Fourth, the trial court relied heavily on a stick-figure drawing made by the neighbor as well as a set of grainy photographs depicting a re-creation of the accident scene. (ROA.178). However, the drawing is not to scale, and does not accurately reflect the placement of the relevant items on the date in question. Specifically, the drawing has the subject vehicle, as evidenced by the depiction of the vehicle's doors, facing the *wrong direction*. *Compare* (ROA.110) (drawing), *with* (ROA.149) (affidavit of driver of vehicle). Moreover, the scale of items in the drawing reflects nothing more than a rough guess as to the position of the objects in relation to each other.

For example, the drawing indicates that the vehicle, a full-sized SUV, is roughly the same size as the front door of Mrs. McWhirter's single-story home. Indeed, according to the drawing, Mrs. McWhirter's front door is actually wider than the SUV. *See* (ROA.110). This inaccurate drawing does not support AAA's burden of negating the

[2] Mrs. McWhirter has lived in the same house for 43 years as of March, 2014. (ROA.142).

existence of a material fact issue. *Cf. Adickes*, 398 U.S. at 160 (noting that summary judgment is improper, regardless of whether or not the nonmovant offers opposing evidence, if the movant's evidence "does not establish the absence of a genuine issue").

The blackened, indistinct photographs are even less helpful. Far from supporting the conclusion that as a matter of law, no material question exists as to Mr. McWhirter's placement in relation to the vehicle, these images are essentially useless. *See id.* One cannot discern the relationship between the vehicle and where Mr. McWhirter was lying because of the poor quality of the photos *See* (ROA.112) (noting that the portion of the photograph containing the vehicle to the left of Mr. McWhirter is completely black, thus rendering the photo useless).

Moreover, the district court's findings are opposed by the competent summary judgment evidence offered by Mrs. McWhirter. Based on the drawing and photos, the court concluded that Mr. McWhirter was "well away from the rear car door," yet his daughter, who was at the scene, stated that the "car door was open above him." *Compare* (ROA.178), *with* (ROA.149). The court concluded also that Mr. McWhirter was found "a few feet away from the car," yet Mrs.

McWhirter stated that she found him "right next to the car." *Compare* (ROA.178), *with* (ROA.142).

The district court also made the factual determination that Mr. McWhirter began walking to the house but "slipped" during his approach to the front porch. (ROA.178). This conclusion is contrary to the evidence provided by the nonmovant—Mrs. McWhirter. Her daughter affirmed that although it was cold the night of the accident, the conditions were dry. (ROA.149).

Finally, the district court postulated that had Mr. McWhirter still been exiting the vehicle when he fell, he would have been found "adjacent to the car," and in a position different than that in which he ended up. (ROA.178). Mr. McWhirter, however, *was* found adjacent to the car. *See* (ROA.142); (ROA.144); (ROA.149). And with the utmost respect for the district court, any assertion as to how Mr. McWhirter should have been lying on the ground is mere conjecture, premised on a guess as to the final position a specific human body would find itself in after it lost control alighting from a vehicle.[3]

[3] The district court also cited Mrs. McWhirter's daughter as stating that the accident occurred after her father exited the vehicle. (ROA.177). Unfortunately, the district court chose not to cite the daughter's explanation that the statement was made in the context of whether Mr. McWhirter fell from stairs, as AAA was

B. Additional Evidentiary Support for Mrs. McWhirter's Position

Mrs. McWhirter provided affidavit testimony as to the condition of the surface where Mr. McWhirter would have stepped when exiting the backseat of his daughter's SUV. She stated that where her husband would have placed his feet, there exists "an uneven area where the edge of the driveway meets the yard." (ROA.144). It is reasonable to infer that an uneven ground surface could be problematic for *any* individual attempting to exit a full-sized SUV. The difficulty is amplified when the individual is 86 years old.

The fact that Mr. McWhirter's car door was still open, in light of the uneven ground surface and the fact that he was found directly adjacent to the car, is critical with respect to whether he had fully exited the vehicle before he fell. Mrs. McWhirter stated that her husband was the only person in the backseat. (ROA.142). Therefore, the car door was not left open for another passenger to exit.

It is apparent that Mr. McWhirter did not have time to close the car door because he fell while exiting the vehicle. There is no

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erroneously claiming. She was not intending to modify her position, or that of her mother, that Mr. McWhirter fell while exiting the SUV. (ROA.150).

appreciable temporal or situational separation between the instant Mr. McWhirter placed his feet on the ground and the instant he would have closed the car door such that one could clearly delineate, as a matter of law, at what point "exiting" concluded and "exited" began. Summary judgment is improper given that Mr. McWhirter never even reached the point of closing the door. *See Wyatt*, 297 F.3d at 409 (noting that at the summary judgment stage, all reasonable inferences must be drawn in the nonmoving party's favor).

For the purpose of summary judgment, the test is simply whether a plaintiff reasonably *could* prevail in a jury trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (noting that the test is whether "a reasonable jury could return a verdict for the nonmoving party"). The district court, however, seemed to charge Mrs. McWhirter with the task of proving that she *would* prevail in a jury trial. This heightened burden was improper. Mrs. McWhirter brought forth sufficient evidence to carry her case beyond the summary judgment stage. Judgment in AAA's favor was in error.

C. Texas Courts Have Liberally Construed Similar Language in Insurance Policies

Mrs. McWhirter could not find any case addressing the application, or scope, of the phrase "[w]hile driving, riding in, boarding or exiting from any private passenger automobile," or any substantially similar variation thereof. However, a handful of cases provide insight into Texas's liberal interpretation of insurance language related to automobiles.

1. "Motor Vehicle Accident" and "Motor Vehicle Use" Cases

In *Texas Farm Bureau Mut. Ins. Co. v. Sturrock*, 146 S.W.3d 123 (Tex. 2004), the Texas Supreme Court held that an insured is involved in a "motor vehicle accident," and is therefore covered under the personal injury protection provision of his insurance policy, when he tangles his foot on the bottom of his truck door while exiting the vehicle after parking and turning the engine off. *Id.* at 125.

In *Mid-Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153 (Tex. 1999), the Texas Supreme Court held that an insured is involved in an "accident arising out of the use of [a motor vehicle]" when a boy attempts to climb through the back window of a parked truck,

unintentionally causes a shotgun to discharge, and the bullet strikes the insured sitting in the next car. *Id.* at 155, 164.

In *Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151 (Tex. 2010), the Texas Supreme Court held that employees of a subcontractor are involved in an accident "arising out of" the "use" of an "auto" when they fall while being hoisted up a cell tower with a pulley system attached to the front of a pickup truck. *Id.* at 152–53, 155.

Finally, in *Lincoln Gen. Ins. Co. v. Aisha's Learning Ctr.*, 468 F.3d 857 (5th Cir. 2006), this Court applied Texas law and held that a child's injuries arise from the "use" of a vehicle when that child is left in a daycare van in the center's parking lot for seven hours. *Id.* at 858, 861.

These cases reflect a willingness to interpret insurance policy terminology, drafted by the insurer, in a manner that encompasses the full range of situations that could reasonably occur within the boundaries of the language. Importantly, however, the present case is even simpler. The present case does not call for a boundary-testing analysis like the above cases.

While exiting the vehicle, Mr. McWhirter had an accidental fall, and was discovered lying right next to the car with his car door open

above him. Mrs. McWhirter produced facts sufficient to fulfill her legal burden. Summary judgment was in error.

2. "Occupying" a Motor Vehicle Cases

Several Texas cases also address what constitutes "occupying" a vehicle for coverage purposes. These cases are factually dissimilar to the instant case to such a degree that they provide little guidance. However, they do show that Texas courts trend toward greater separation (both temporally and proximally) from a vehicle than Mr. McWhirter experienced before a person is no longer considered to be inside, entering or exiting, or upon that vehicle as a matter of law.

In *United States Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603 (Tex. 2008), a man was hit by a careless driver after he pulled over, "closed the [car] door, and walked around the front" of his car to help a stranded motorist. *Goudeau*, 272 S.W.3d at 605. The Texas Supreme Court was tasked with deciding whether the injured man was "in, upon, getting in, on, out or off"[4] of his vehicle at the time of the accident. *Id.* at 606. The insured's only contention was that he was "upon" the vehicle at the time of injury. *Id.* The court declined to extend the word "upon" to

[4] This is the definition of "occupying" a vehicle used in *Goudeau* and *McDonald*.

a situation where a person finds him or herself thrown *upon* the vehicle merely as a result of the accident. *Id.*

In *McDonald v. Southern Cnty. Mut. Ins. Co.*, 176 S.W.3d 464 (Tex. App.—Houston [1st Dist.] 2004, no pet.), the Houston court of appeals concluded that two men are no longer "occupying" their truck for insurance coverage purposes after they lock it up, walk across a ditch and a service road, and then walk for an additional five minutes before being hit. *See id.* at 476.

In *Ferguson v. Aetna Cas. & Sur. Co.*, 369 S.W.2d 844 (Tex. Civ. App.—Waco 1963, writ ref'd), the Waco court of appeals held that a woman is not "in or upon" a car for insurance coverage purposes when she does nothing more than grab the door handle of a random car to steady herself while walking. *Id.* at 845–46. Importantly, the court did note, however, that "a different situation would be presented" if, when she falls, she has her hand upon the car handle for the purpose of entering the vehicle. *Id.* at 846.

These cases represent outcomes that are logically tethered to the facts. It is expected that one who walks away from their vehicle for more than five minutes cannot be said to still be occupying that vehicle.

See McDonald, 176 S.W.3d at 476. Likewise, one who uses a random vehicle merely as a steadying device as they walk through a parking lot is not occupying that vehicle under any reasonable interpretation. *Ferguson*, 369 S.W.2d at 846.

Mr. McWhirter's situation, however, is drastically different. His insurance policy covered him for accidents "while . . . exiting from any private passenger automobile." (ROA.84). While exiting his daughter's SUV, Mr. McWhirter had an accidental fall.

He had not closed the door and walked to the front of the car as the insured did in *Goudeau*. Nor had he walked for more than five minutes as the insured did in *McDonald*. Mr. McWhirter's accident happened so fast that his car door remained open. (ROA.149). At a minimum, material disputed facts exist. Summary judgment was improper. Mrs. McWhirter urges this Court to reverse the district court's ruling.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's grant of summary judgment in favor of AAA and remand the

case back to the district court for further proceedings in accordance with this Court's decision.

February 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 20, 2015, the foregoing Brief was filed electronically using the Court's CM/ECF system, which will give notice of the filing to counsel for the Appellee. In addition, a copy of the Brief was served on counsel for the Appellee by First-Class Mail, addressed as follows:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,828 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century font size 14.

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